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1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Comments of Devon Energy on EPA's Draft Oil and Gas Exploration and Production Facilities New Owner Audit Program Agreement

Dear Ms. Chapman and Mr. Sullivan:

On behalf of Devon Energy Production Company, L.P. ("Devon"), I am writing to provide the U.S. Environmental Protection Agency ("EPA") with comments on its draft Oil and Natural Gas Exploration and Production Facilities New Owner Audit Program Agreement ("Draft Agreement" or "Agreement").

We applaud EPA's efforts to encourage oil and gas exploration and production companies to undertake compliance evaluations at newly-acquired facilities without the threat of penalty assessments for violations found during the evaluations. By removing the threat of enforcement against new owners working to get a clearer picture of the compliance status of their facilities, EPA is removing a significant disincentive for those companies to proactively investigate and correct problems, many of which could have significant environmental implications.

Our comments generally follow the sequence and framework of the Draft Agreement.

Introduction

1. Form of the Agreement – The Draft Agreement provides the regulated community with the standard terms that would be required to enjoy the penalty mitigation benefits available to new owners of oil and gas facilities. This is a substantial improvement to EPA's New Owner Policy, under which a company currently negotiates the terms of the audit agreement with EPA through an exchange of letters.

2. Interaction with Other Policies – In contrast to the New Owner Policy, which explains its relationship to EPA's 2000 Incentives for Self-Policing: Discovery, Disclosure,

Correction, and Prevention of Violations" (the "Audit Policy"), the Draft Agreement does not describe its relationship to either of the prior policies. Although the Draft Agreement contains an integration clause claiming that the agreement and its appendices "constitute the final, complete, and exclusive agreement and understanding among the parties", Agreement at ¶30, the Agreement should specifically state whether and to what extent the Audit Policy or the New Owner Policy can be used to provide context and meaning to the Draft Agreement.

Audit Program Eligibility

3. Timing of Notice to EPA – The Draft Agreement requires companies to notify EPA within six months of acquisition, and to finalize an audit agreement within twelve months of acquisition. Agreement at ¶4(c). The Agreement does not make clear what the notice should provide, however. Nor does it indicate whether the notice requirement would be triggered upon determining that a violation *may have* occurred. In any event, the Agreement should clarify what happens after notice is provided, including whether the company or EPA is responsible for the initial drafting of an agreement.

4. Regulatory Programs – Although the Draft Agreement addresses only Clean Air Act compliance, it should be expanded to encompass other regulatory programs as well. Responsible new facility owners will certainly want to audit their acquired facilities for violations they may have inherited from the prior owner under the Clean Water Act (e.g., Spill Prevention Control and Countermeasure compliance and National Permit Discharge Elimination System compliance) and the Resource Conservation and Recovery Act. It would be impractical, inefficient, and confusing for new owners to look to the Draft Agreement for Clean Air Act audit requirements and to an exchange of letters under the existing New Owner Policy for all other regulatory programs. Partially addressing the new owner's penalty exposure would also fail to achieve the Draft Agreement's objective of removing disincentives to self-assessment and disclosure.

   Even as to matters pertaining to the Clean Air Act, the Draft Agreement does not clearly specify the particular regulatory programs that should be included in a new owner's audit of its facilities. The Agreement provides that each company

   > "shall conduct an Audit of its Facilities' compliance with agreed upon provisions of the Clean Air Act, its implementing regulations, and federally-approved and -enforceable requirements of applicable State Implementation Plans (SIPs) (including permit requirements and permits). At a minimum, [COMPANY] shall comply with Appendix B's requirements." Agreement at ¶5.

   Neither the Agreement nor Appendix B indicates which specific Clean Air Act provisions, regulations, or permit provisions are expected to be considered in most facility audits. Although it is important that companies have the flexibility of negotiating which regulatory programs will be included in an audit, it would also be

helpful to know which regulations EPA will expect to be included. Moreover, neither the Agreement nor Appendix B provide guidance on how the applicable statutory, regulatory, and permit provisions should be identified and memorialized. Devon recommends that the Agreement describe the process by which the new owner is supposed to obtain approval from EPA of the specific statutory, regulatory, and permit provisions to be used in auditing the facilities in question.

5. Covered Facilities – The Draft Agreement should clarify whether the protections afforded to a new owner continue after the owner sells its stake in a given facility. Devon believes these protections should continue, retrospectively and prospectively, as long as the seller or purchaser completes the requirements of the negotiated agreement.

6. Schedule – The proposed schedule should specifically include the possibility of extensions, as requested by the company and agreed to by EPA.

Corrective Action

7. Date of Discovery – The Draft Agreement requires new owners to correct violations within 60 days of discovery (absent an agreed extension by EPA), but it fails to indicate what constitutes "discovery." Agreement at ¶10. Where a single facility is involved, EPA should clarify that discovery is when a new owner has actual knowledge that a violation has occurred. Where multiple facilities are involved, EPA should consider "discovery" to take place when the new owner submits a report summarizing its investigation into a certain type of violations.

   EPA's Audit Policy defines the "discovery" of a violation as "when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred." The "objectively reasonable basis" is considered to be what a prudent person, having the same information, would have believed. This standard is inherently subjective and ambiguous, and is particularly difficult to ascertain in the oil and gas production sector. For instance, a belief that facilities may have been improperly permitted based on production levels at the time of acquisition might lead personnel to suspect that violations have occurred, but a company would not be able to make a definitive determination until it calculates a site's emissions or potential-to-emit after taking condensate samples, develops emissions factors, and applies those calculations to production data. This process is even more complicated by the need to make source-by-source determinations after evaluating equipment and equipment-specific calculations, such as the potential-to-emit of storage vessels. Accordingly, basing "discovery" on a hypothetical assessment of what a prudent person might have known is inappropriate and unworkable; "discovery" should be based on actual knowledge by the company. Actual knowledge should be the point at which a company representative has made a fact-based determination that a violation has occurred.. This determination would then trigger the 60-day corrective action timeline for a

single facility; for multiple facilities, the reporting to EPA of multiple determinations would instead trigger the 60-day timeline.

EPA has recommended in the Audit Policy that if a company has some doubt as to the existence of a violation, that the company proceed with disclosure and allow the regulatory authorities to make a definitive determination, but this could mean hundreds of disclosures that all must be addressed within 60 days.

Even where a company has actual knowledge of a violation at one or more of its facilities, it is equally unworkable to trigger the 60-day "clock" for corrective action where the acquisition might involve dozens if not hundreds of facilities. It would be extremely difficult for a new owner or EPA to keep track of corrective action deadlines if a separate 60-day clock were to run for each discovered noncompliance. EPA should therefore take a prudent and pragmatic approach to this problem by agreeing that discovery is be based on the date that a company submits a report addressing a particular category of regulatory requirements. The Agency should retain discretion to use the date of a report addressing a particular component of an audit as the date of discovery of any non-compliance identified in that report. In short, two fixes are needed to address the uncertainty around when "discovery" of a violation occurs. First, for situations involving only a single facility, EPA should clarify that "discovery" of a violation takes place no earlier than when the new owner has knowledge of a violation, through a fact-based determination. Where multiple facilities are involved, EPA should provide that "discovery" occurs when the new owner completes its audit of the facilities at issue (or a component of that audit) and submits a report to EPA summarizing the company's findings for given regulatory programs (e.g., permitting, vapor control systems, NSPS, and NESHAP). This report would include the individual determinations for the facilities contained in the multiple facility report.

8. Timing of Corrective Action – Devon has two comments regarding the timing of corrective action. First, where a significant number of facilities are involved and numerous violations are likely, parties should be able to propose a schedule for addressing certain types of corrective action *before* each such violation is discovered. Forcing companies to wait until the 60-day "clock" has begun, as the Draft Agreement suggests, creates unacceptable enforcement uncertainty and a disincentive for parties to discover and report violations.

Second, EPA's regulations governing the New Source Performance Standards at 40 C.F.R. Part 60, Subparts OOOO and OOOOa, require sources to determine their actual and potential-to-emit shortly after a unit commences operation. In some instances, however, a new owner may not have inherited reliable data recorded at the time of production startup. This leaves a new owner to identify potential violations after the prescribed period for making regulatory applicability determinations. As such, a new owner may only be able to evaluate a site using post-acquisition data. A sensible approach would be for EPA to allow sources to

determine the throughput and/or potential-to-emit during the course of the post-acquisition Audit Program, when the company can more accurately determine facilities' throughput and emissions. The agreement should allow for new owners to use engineering estimates for initial production data and other operational data where that data is otherwise unavailable for the purpose of determining whether or not a certain facility meets or exceeds threshold or other design requirements.

9. Corrective Action in Permitting – EPA needs to clarify what measures constitute "corrective action" in the context of permitting obligations. Agreement at ¶10. For instance, does the mere submission of a permit *application* constitute corrective action or does a company need to obtain the new permit before certifying compliance? In our view, a timely submitted permit application should suffice as corrective action for a facility that should have been previously permitted.

   Another question that frequently arises in the oil and gas sector is whether the company can take into consideration the emission controls it will be installing (and hence become a minor source) when submitting a permit application. Devon believes it would be inefficient and inappropriate to have to submit a permit application before contemplated emission controls are installed and then a subsequent permit modification once controls are installed. In addition, a state with delegated permitting authority may have its own preferred process.

   In any event, EPA should include in the final Agreement guidance on what constitutes corrective action for post-acquisition permitting and whether the Agency will accept directions from state permitting authorities in evaluating acceptable corrective action.

10. Engineering and/or Design Issues – Notwithstanding the Draft Agreement's requirement that violations be addressed within 60 days (unless extended by agreement of EPA), the Agreement provides new owners with additional time – to the end of the negotiated audit agreement period – to address violations relating to "engineering and/or design issues." Agreement at ¶11. Yet the Agreement fails to define "engineering and/or design" or explain which issues or violations are a matter of "engineering and/or design." In the absence of any clarification as to which issues are "engineering and/or design" issues, regulated parties may not know the appropriate timeline for corrective action of a given violation. Devon would welcome the opportunity to work with EPA and other interested stakeholders to develop a clear but sufficiently flexible definition of "engineering and/or design issues."

11. Imminent and Substantial Endangerment – The Draft Agreement requires parties to address conditions it discovers that may present an imminent and substantial endangerment to public health or welfare or the environment. Agreement at ¶12. This provision is overly broad and inappropriate. The requirement to address such endangerments under the Clean Air Act is limited to situations where a source or combination of sources *is presenting* an imminent an imminent and substantial

endangerment, and not situations where those sources only *may present* an endangerment, which is significantly broader. This exception could negate the rules providing for 60-day or negotiated schedules for corrective action.

Even if a new owner were to determine that circumstances present an imminent and substantial endangerment, it is equally unclear what actions would be deemed sufficient, and whether EPA would agree that the actions contemplated are those "necessary to protect public health, welfare, and the environment" as the Draft Agreement provides.

A better approach would be to expressly preserve EPA's authority to take action if it determines that a source or combination of sources is presenting an imminent and substantial endangerment. Although nothing in the Draft Agreement suggests that EPA's imminent and substantial endangerment authorities under Section 303 of the Clean Air Act would be waived or altered, it would be more appropriate for EPA to simply reserve its authority to respond to such endangerments.

Reporting and Recordkeeping

12. Audit Instruments – Paragraph 13 of the Draft Agreement requires new owners to submit the reports and maintain the records described in Appendix C. Appendix C, in turn, requires new owners to submit company-tailored audit protocols and audit checklists, which the Draft Agreement refers to as "Audit Instruments." However, the Agreement does not provide guidance on what types of protocols or checklists are contemplated. Protocols and checklists may be site-specific, for particular field work tasks, or more general, such as for coordinating various regulatory programs subject to review.

    Although greater clarity is needed on this issue, Devon does not believe it necessary or appropriate for EPA to provide a detailed list of all protocols and checklists. Devon suggests that EPA (a) describe the protocols it wishes companies to develop and (b) develop a list of the minimum information it needs from new owners in order to provide them with the benefits of the Draft Agreement.

13. Final Report – Since many facilities may have multiple violations, it would be more efficient to provide the basic facility information up front, rather than each time a violation is discovered. Accordingly, EPA should first require the basic facility information in Appendix [X], which lists all of the facilities to be audited, at the beginning of the audit. This would include the name, location, GPS coordinates, API well number, and facility permitting status, all of which are currently requested in Appendix C(3)(A)(i)-(v). This information should be provided in a table or spreadsheet in Appendix [X]. EPA should also be flexible in amending Appendix [X] as a company develops more information regarding the facilities over the course of the audit.

    Appendix C(3)(A)(xiii) requires new owners to identify in their final reports a discussion of which corrective actions were conducted pursuant to Appendix B(5)(A),

which addresses the adequacy of vapor control system design and sizing and VOCs seen through an IR camera during liquids transfer from well to tanks. It is unclear why EPA is distinguishing these actions in the final report, and whether it is because they are subject to the negotiated corrective timeline for "engineering and design issues" referenced in Paragraph 11 of the Draft Agreement. If so, EPA should state as much in the Agreement.

14. Summary of Compliance Information – The Draft Agreement requires companies to track and report specific information regarding the costs incurred in returning to compliance. Appendix C(3)(B)(ii). Given that the New Owner Policy provides penalty forgiveness for the economic benefit and gravity components of any violations preceding the new owner's acquisition of the facilities, there is no readily apparent need for companies to track and report this information.

    If EPA is unwilling to drop this requirement from the Draft Agreement, EPA should, at a minimum, clarify that companies (a) need only provide an estimate of its total compliance costs, and (b) need not break down the estimate into the categories of costs listed parenthetically in Appendix C(3)(B)(ii).

General Provisions

15. Resolution of Civil Liability – The Draft Agreement provides that EPA will issue some kind of determination, called a "Final Determination," at the completion of the Audit Program. Agreement at ¶14. The Agreement does not indicate when the Audit Program will be considered complete, however, nor does it provide a timeline for such a determination by the Agency. A better approach would be for the parties to agree that (a) the Final Report required by Appendix C, when accepted by EPA without comment, objection, or request for further modification, will constitute the completion of the Audit Program and (b) that EPA will issue its Final Determination within a fixed period of time (e.g., 60 days) of approving the new owner's Final Report.

    The provisions of Paragraph 14 would also be better placed in Section V: Effect of Agreement – Resolution of Civil Liability for Disclosed and Corrected Violations. In addition, Paragraph 14 should also be merged into, or at least reconciled with, Paragraph 22, both of which address the resolution of civil liability for violations disclosed and corrected.

    EPA should also clarify whether penalty forgiveness is complete, as indicated by Paragraph 22 of the Draft Agreement, or whether new owners can still be assessed certain penalties. According to the New Owner Policy, new owners remain liable for the "economic benefit" that they receive from non-compliance post-acquisition, but it is unclear what is encapsulated in the economic benefit or gain that a company receives when it acquires facilities that require substantial retrofitting and improvements. For example, is the cost of a company's audit and the cost of all corrective action subtracted from EPA's calculation of the economic benefit? Is the

company liable for post-acquisition economic benefit if it completes the audit activities within the timeframe agreed by the parties and undertakes corrective action within the schedule approved by the agency?

EPA should clarify in the final Agreement that companies will not be held responsible for economic benefit post-acquisition as long as they identify violations within the timeframes agreed by EPA and complete corrective action within the schedule approved by EPA.

Additional Comments

16. Requirement for Discovery Through Periodic Compliance Reviews – The Draft Agreement should clarify that new owners do not have to discover violations through a periodic review of their facilities.

    Under the Audit Policy, any violations eligible for favorable self-disclosure treatment must have been discovered through some type of program of systematic investigation, such as an environmental audit or a compliance management system. An environmental audit is considered "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

    The New Owner Policy changed this criterion by eliminating the "periodic" review requirement in the case of pre-acquisition due diligence, but kept it for all other cases. In such other cases, the new owner would be eligible for only 75% penalty mitigation since discovery would not be considered systematic. This does not make sense in the context of a new owner since a party will not have ownership of the facilities and therefore cannot properly audit them until closing.

    A company should be allowed to perform a one-time audit following acquisition of new facilities to verify compliance and EPA should clarify that the "periodic" requirement need not be met for new owners, at least in the oil and gas sector.

17. Prior Owner Data and Regulatory Applicability Determinations – As noted in Paragraph 8, above, the VOC and methane capture regulations (40 C.F.R. Part 60, Subparts OOOO and OOOOa) require a determination as to whether storage vessels are subject to the regulations to be made in the first 30 days following start-up, but a new owner may need to determine whether newly-acquired storage vessels are subject to these regulations outside that window if the prior owner did not make a determination or the determination appears faulty. Further complicating the matter, the new owner may not have accurate or reliable data from the first 30 days following startup, which could have been years ago. The Agreement should clarify whether a company may make an assessment based on current, post-acquisition data.

An associated issue is whether a new owner is required to rely on applicability determinations made by the prior owner or data collected by the prior owner. It would not be appropriate or protective of the environment to require a new owner to abide by an applicability determination made by a prior owner that the new owner knows is wrong.

EPA should clarify that new owners may make applicability determinations based on post-acquisition data they gather, and should allow engineering estimates for making the determinations where data is not available to the new owner. The Agency should also provide companies with sufficient time (such as nine to twelve months after the audit agreement) in which to make such determinations.

18. State Audit Agreements – States vary significantly in their respective approaches to audit disclosures. Some have audit programs by statue, some by regulation, and some by guidance. Others, such as Louisiana, have no such program and maintain that it is simply a consideration to be taken into account by the state in determining the appropriate enforcement response.

    Under the Clean Air Act, the state agency is normally responsible for implementing the statute and is the permitting authority, which means that a self-disclosing company must satisfy both the state agency and EPA (even though the state may not have a self-disclosure policy).

    In some instances, EPA has over-filed, finding the state program or its oversight of an audit agreement to be inadequate. This creates unnecessary uncertainty for the new owner, and provides a disincentive to entering into any such agreement.

    EPA should clarify whether and to what extent a company has to enter into audit agreements with both federal and state regulators, and the extent to which one agency would recognize an agreement with the other.

19. Distinguishing Audit Investigations from Other Clean Air Act Monitoring and Reporting Obligations – EPA needs to clarify whether its audit obligations should include monitoring and reporting obligations that would exist independent of any audit agreement.

    The regulations at 40 C.F.R. Part 60, Subpart OOOOa, for example require that a company conduct semi-annual leak detection and repair (LDAR) surveys. Any leaks discovered must be repaired within 30 days. Further, the company must report any deviations from the requirements on their annual report. Since oil and gas companies are already required to perform semi-annual inspections at each well site and report any discovered deviations, it is unclear why they would self-disclose such leaks as violations. Even if such inspections and reports are included, it's unclear whether the 30-day window in which to rectify any leaks would be able to utilize the 60-day window for corrective action under its audit agreement instead.

    EPA should clarify whether violations discovered based on other Clean Air Act monitoring and reporting programs (beyond Title V) should nonetheless qualify for

audit policy protection or whether these violations cannot be considered voluntarily discovered.

Miscellaneous Comments

20. In Paragraph 17, the correct citation in the last sentence should read "in accordance with Section III and Appendix B", rather than "in accordance with Section IV and Appendix B."

21. Paragraph 22 appears circular in that it purports to resolve a company's civil penalty liability by not imposing a civil penalty. The Draft Agreement should also be clear on how liability for such penalties would be "resolved." Devon suggests revising the sentence to read,

    "Pursuant to this Audit Program and as an exercise of enforcement discretion, EPA agrees to not assess any civil penalty against [the COMPANY] for the disclosed Violations that are satisfactorily corrected consistent with this Agreement's requirements."

Thank you once again for the opportunity to provide comments on the Draft Agreement. Please feel free to contact me if you have any questions or would like to discuss our comments further.

Sincerely,

Jim Farrell
Vice President
Environmental, Health and Safety